SYED ISMAIL v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah J.) April 20, 1967]

[K.L. — Criminal Appeal No. 1 of 1967]

Bribery and Corruption — Document containing false statement — Knowingly using, with intent to deceive principal — Evidence of character — Prevention of Corruption Act, 1961, s. 4(c).

Criminal Law and Procedure — Re-trial — Joint trial — Issue estoppel — Accomplice — Weight of evidence — Credibility of witness — Evidence of character of appellant.

The appellant was a District Officer and was charged together with his brother-in-law and one other who was a *penghulu* for offences contrary to section 4(c) of the Prevention of Corruption Act, 1961. The charge against him read as follows: "That you on 6.4.1964 at District Office, Ulu Langat, in the State of Selangor, being an agent of the Government of the State of Selangor, to wit, a District Officer of Ulu Langat District, knowingly used with intent to deceive your principal, a document, to wit, Indent No. 13/64 in respect of which your principal is interested and which document contains a statement which is false in material particular, namely it stated that the work had been performed and which to your knowledge was intended to mislead your principal and that you have thereby committed an offence punishable under section 4(c) of the Prevention of Corruption Act, 1961". At the first hearing all three were convicted. His brother-in-law and the appellant appealed against their conviction and Ong Hock Thye F.J. ([1966] 1 M.L.J. 229) allowed their appeal and ordered a re-trial. At the re-trial they were jointly tried and at the conclusion of the hearing the appellant was convicted and sentenced to six months imprisonment.

The appeal was *inter alia* on the following grounds: (i) as Ong Hock Thye F.J. had ordered a re-trial the joint trial at the re-trial was a nullity as there was no power of consolidation of cases; (ii) issue estoppel was raised as a convicted accomplice (the *penghulu*) was called by the prosecution to allege that he was innocent in contradistinction to his conviction; he was therefore estopped from giving evidence on the facts on which his conviction was based; (iii) the conviction was against the weight of evidence; (iv) the learned president in assessing the credibility of P.W.5 and the appellant had failed to take into consideration the previous good character of the appellant as opposed to that of witness P.W.5.

Held: (1) this was not a case of consolidation of cases but of two separate persons being charged and tried in respect of two separate offences committed in the same transaction: the question was one for the discretion of the learned president, whose decision could only be reversed if it was done capriciously, but in this case all the elements were present which would justify the exercise of discretion in favour of a joint trial;

(2) issue estoppel as enunciated in *Sambasivam* v. *Public Prosecutor* (6) is not applicable in this case as it does not apply to a re-trial of the same accused in respect of the same charge;

(3) the evidence before the learned president was such as to enable him to say that the appellant had not raised a reasonable doubt as to his guilt or as to the truth of the prosecution case and there was no reason to say that in reaching his decision he had applied the wrong test;

(4) in the present case there was no positive proof as to the excellence of the appellant's character. He had neither pleaded nor produced evidence of his character beyond stating his educational background and administrative experience.

Cases referred to:—

(1) *R.* v. *Baskerville* [1916] 2 K.B. 658.

(2) *Crane* v. *Director of Public Prosecutions* [1921] 2 A.C. 299.

(3) *R.* v. *Dennis & Parker* [1924] 1 K.B. 867.

(4) *R.* v. *Assim* [1966] 3 W.L.R. 55.

(5) *Sardara & Ors.* v. *R.* A.I.R. 1945 Lahore 286, 292.

(6) *Sambasivam* v. *Public Prosecutor* [1950] M.L.J. 145.

(7) *Kemp* v. *The King* (1951), 83 C.L.R. 341.

(8) *Mraz* v. *The Queen (No. 2)* (1956), 96 C.L.R. 62.

(9) *R.* v. *Connelly* (1964), 48 Cr. App. 183.

(10) *R.* v. *Wilkes* (1948), 77 C.L.R. 511 at pp. 518, 519.

(11) *Harris* v. *State of Georgia* (1941), 17 South Eastern Report, 573.

(12) *Pritam Singh* v. *State of Punjab* A.I.R. 1956 S.C. 45.

(13) *Manipur Administration* v. *Thokchom Bira Singh* A.I.R. 1965 S.C. 87.

(14) *Hashim* v. *Public Prosecutor* [1967] 1 M.L.J. 251.

(15) *Mohamed Yatim* v. *Public Prosecutor* [1950] M.L.J. 57, 59.

(16) *Mah Koh Cheong* v. *R.* [1953] M.L.J. 46, 47.

(17) *Emperor* v. *Khurshid Hussain* A.I.R. 1947 Lahore 410.

CRIMINAL APPEAL.

Dato' David Marshall for the appellant.

Ajaib Singh (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah J.: This is an appeal against conviction of the appellant by the President, Sessions Court, Kuala Lumpur, under section 4(c) of the Prevention of Corruption Act, 1961, and sentence of six months imprisonment. I have already intimated that this appeal will be dismissed and now proceed to give my reasons.

The present appeal has a long history. On 2nd January 1965 the present appellant, who was the District Officer, Kajang, was charged together with his brother-in-law (*biras*) Hashim bin Talib,* who had no experience of contract work, and Raja Shamsusah the Penghulu of Mukim Ulu Langat.

The charge against Hashim is Kajang Arrest Case No. A1 of 1965 and reads as follows:—

"That you on 6.4.1964 at District Office, Ulu Langat, in the District of Ulu Langat, in the State of Selangor, knowingly gave Chew Kim Joo who was an agent of the Government of the State of Selangor, to wit. a financial clerk in the District Office, Ulu Langat, a document, to wit, Indent No. 13/64, in respect of which the principal was interested and which document contains a statement which is false in material particular namely it stated that the work had been completed when in fact it had not

* See [1967] 1 M.L.J. 251.

been performed and which to your knowledge was intended to mislead the principal and that you have thereby committed an offence punishable under section 4(c) of the Prevention of Corruption Act, 1961".

The charge against the present appellant is Kajang Arrest Case No. A2 of 1965 and reads as follows:—

"That you on 6.4.1964 at District Office. Ulu Langat, in the District Ulu Langat, in the State of Selangor, being an agent of the Government of the State of Selangor, to wit, a District Officer of Ulu Langat District, knowingly used with intent to deceive your principal, a document, to wit, Indent No. 13/64 in respect of which your principal is interested and which document contains a statement which is false in material particular, namely it stated that the work had been completed when in fact it had not been performed and which to your knowledge was intended to mislead your principal and that you have thereby committed an offence punishable under section 4(c) of the Prevention of Corruption Act, 1961".

The charge against Raja Shamsusah is Kajang Arrest Case No. A3 of 1965 and reads as follows:—

"That you on 6.4.1964 at District Office, Ulu Langat, in the District of Ulu Langat, in the State of Selangor, abetted the commission of an offence punishable under section 4(c) of the Prevention of Corruption Act. 1961, for using a false document to wit, Indent No. 13/64. by one Syed Ismail bin Ahmad, which offence was committed in consequence of your abetment that you certified the completion of the work referred to in the said indent and that you have thereby committed an offence punishable under sections 11 and 4(c) of the Prevention of Corruption Act, 1961".

On 13th January 1965 the case was mentioned. All the three accused persons were separately represented by counsel. From the record (Selangor Criminal Appeal No. 63 of 1965) it is noted that Mr. Chelliah who was representing the present appellant submitted that a separate trial would be more convenient but he left it to the court. The learned deputy public prosecutor submitted that the case was in respect of one transaction and requested a joint trial. The learned president ruled that the three cases would be taken together.

The case eventually came up for hearing. I will refer to this as the first hearing. In the events that happened all three accused were convicted. Hashim and the present appellant were each sentenced to six months imprisonment and they separately appealed. Raja Shamsusah was bound over under section 294 of the Criminal Procedure Code (Cap. 6) to be of good behaviour. He did not appeal. Ong Hock Thye F.J. heard the appeal which was argued by Che Hussein Onn for Hashim and Dato' Marshall for the present appellant. The facts as presented by the prosecution and the defence of each of the accused persons are reported in [1966] 1 M.L.J. 229. Ong Hock Thye F.J. allowed the appeal and ordered a re-trial, his reason being that the learned president had failed to give reasons for his decision beyond stating that the story of the two appellants had cast no doubt on the prosecution's story and that he was convinced beyond reasonable doubt that there was a conspiracy between those two to cheat the Federation Government.

Both the present appellant and Hashim were again charged in Kajang Arrest Case No. A4 of 1966, that is, a separate charge against each of them in respect of different offences, before a different president. I will refer to this as the second hearing. The charge against both of them was the same as that in the first hearing, namely, in Kajang Arrest Case No. A2 of 1965 and No. A1 of 1965. They were both represented by Dato' Marshall and Che Hussein Onn respectively. It will be convenient to note from the record that no objection was taken in respect of the joint trial. At that trial Raja Shamsusah, an accomplice, gave evidence against both the appellants and he was prosecution witness No. 5. He testified that he did not at any time ask the present appellant for construction of the said work. He admitted signing the indent, certifying that the contract work had been completed, but said that he did so at the request of the present appellant who had told him that the work was completed and that it was done by his *'biras'*.* He explained that when he certified that work was completed he was under the impression that it was in respect of the continuation of work done at Batu 14, Ulu Langat, which was already completed two months previously and for which he had already certified but that he had not inspected it. In any event it would appear that he maintained his story as told by him when he gave his defence at the first hearing. The learned president acquitted the present appellant without his defence being called on the ground that there was no corroboration of Raja Shamsusah's evidence when he said that he was requested by the present appellant to sign the indent on 6th April. Hashim was convicted and sentenced to six months imprisonment.

The learned deputy public prosecutor appealed against the present appellant's acquittal and the learned Chief Justice who heard the appeal ordered the learned president to call for the defence. The facts which the prosecution relied upon can best be seen from the judgment of the learned Chief Justice. In outline they are as follows. The present appellant who was then District Officer, Kajang, caused an indent for the construction of a drain 4′ x 3′ x 3′ for a distance of 30 chains at $20 per chain to be issued to Hashim in circumstances which both knew that the proposed work was fictitious. The said drain was never constructed, but Raja Shamsusah, at the request of the present appellant, certified that it was completed and the present appellant endorsed on the indent an order to pay out the $600 to Hashim. The learned Chief Justice,

* Relation by marriage (*e.g.* the relationship between two men who married sisters). *Ed.*

after referring to the classic statement of the law on accomplice's evidence in *R.* v. *Baskerville* [1] said:—

"In my opinion there was sufficient evidence to corroborate the penghulu's evidence that it was the respondent (the present appellant) who was the chief architect of the whole plot and the penghulu, instead of the scoundrel the defence counsel tried to make out, was a mere tool".

And the learned Chief Justice indicated six items as establishing corroboration of the penghulu's evidence. In the concluding passage he said:—

"In my view there is ample evidence to corroborate the penghulu's evidence that it was the respondent (present appellant) who was responsible for the plot and also to show the respondent (present appellant) knew that the second half of the indent as to the alleged completion of the work was false".

To my mind that passage is perfectly plain and requires no elaboration. When the learned Chief Justice ordered the defence to be called he was of the view that there was overwhelming evidence of an independent and compulsive nature to show that it was the present appellant who was the dominating figure in the whole plot and to show he knew that when the contract work was certified as completed it was false. It is clear from the judgment the learned Chief Justice did not say, and to my mind did not seem to say, that the overwhelming evidence did not show to establish corroboration of the penghulu's evidence that he was requested to sign the indent by the present appellant.

The present appellant made his defence before the same learned president. He testified that he was authorised to issue indents for minor works and in such cases tenders need not be called. In the beginning of 1964 P.W.5 "requested him to allow the construction of a drain as there was an application by padi planters in that area". As no allocation had been made he told P.W.5 to wait and he made a note of it on his memorandum pad. One month later P.W.5 renewed his former request. The present appellant recorded in his memorandum pad details of site, etc. On that date Hashim who had often pestered his brother-in-law for minor work contracts came to see him. The present appellant told him of P.W.5's request and that if he (Hashim) was interested he could approach P.W.5. Hashim told him he knew P.W.5. On the following day Hashim came and asked him to approve the minor work. The present appellant then gave instructions on a piece of paper to P.W.3, his financial clerk, to issue the indent to Hashim. He said that no files were opened when there were only oral requests. He admitted altering the indent at Sungei Langat from "Lot 2773" to "Sungei Langat", his reasons being (1) Sungei Langat is a big area, (2) alteration is for purposes of record, (3) anyone who checked later would know where the construction was undertaken. He said he obtained "Lot 2773" from his note on his memorandum pad. He said that on that day there was a meeting on rural development and all penghulus who were committee members were present. He met P.W.5 at that meeting and informed him that his request for construction of the drain was approved and that the work had been given to "Hashim bin Talib the new contractor". He requested P.W.5 to inspect and advise Hashim as he was a new contractor. He said P.W.5 agreed to do that. One week later Hashim brought back the indent. He was asked whether work had been completed and he replied in the affirmative. He also asked Hashim if P.W.5 had inspected the work. From the record it may be noted that the expected reply was not forthcoming. The present appellant continued by saying that as there was someone else in his room he asked Hashim to leave the indent on his table and leave the room. After that person had left he examined the indent and noticed that P.W.5 had certified that work was completed without any comment. He then authorised payment. He further stated, "I agree that minor works are certified as completed by penghulus if there is no suspicion of certificate". With regard to the cheque he said that Hashim came to see him two weeks later with a crossed cheque and as he had no bank account and as he was returning to Johore he would therefore like to settle his labourers and he asked the present appellant to cash it for him. The present appellant credited the cheque into his bank account and later gave Hashim $600 in cash. He denied telling P.W.5 to sign Hashim's indent as he was his "biras". He denied conspiring with Hashim or P.W.5 to cheat the Government of $600 for a fictitious work. He said that when he signed the indent he believed the work had been done. He denied instructing P.W.3 on a piece of paper to prepare the indent for Hashim. He also denied that Hashim brought back the prepared indent. With regard to the alteration of particulars on the indent with the particulars on his memorandum pad he found that the lot number had been left out by P.W.3. He denied altering the indent for the purpose of evading Treasury suspicion. He further said that when Hashim confessed to him that the work was fictitious he advised him to return the money which was later paid back into the vote. In re-examination he said that when the indent came back to him for authorisation for payment he was not aware that only seven days had elapsed.

The defence called a witness who has been a Government class C and D contractor for the past 27 years. It is interesting to recapitulate his evidence. He testified:—

"One chain of drain can be completed by three labourers in one day. Their pay will be $4 per day. The knowledge as to earth drain contruction by a D.I.D. engineer would be the same as P.W.D. engineer". On cross-examination: "Thirty labourers would be required to construct ten chains a day. 4' x 3' x 30' drain I would

charge Government $19 to $20 in 1964 for one chain. I can complete thirty chains with thirty labourers in three days. Fifteen labourers would be required per day for 6-7 days for thirty chains. The labourers would have to provide their own tools. No such labourers at Dusun Tua. Payment of labourers at $6 per day would be $90 per day, for seven days would be $640. $600 would be a loss to the contractor. If workers are paid $4 per day the amount of wages would be $420, but $4 per day would be for six hours work only, not eight hours work".

At the conclusion of the hearing the present appellant was convicted and sentenced to six months imprisonment. Hence the present appeal.

In my view the appeal can be disposed of under four main heads.

The first ground of appeal is that as Ong Hock Thye F.J. had ordered a re-trial of Kajang Arrest Cases Nos. A2 of 1965 and A1 of 1965 (see [1966] 1 M.L.J. 229) the joint trial in Arrest Case No. A4 of 1966 was a nullity as there is no power of consolidation of cases. Counsel submitted that since no special provisions exist in respect of consolidation of cases section 5 of the Criminal Procedure Code enables us to resort to the practice enforced in the Colony insofar as it is not inconsistent with our Code and section 5 of the Colony Code in like manner empowers adoption of the practice enforced in England if it is not inconsistent with the Colony Code. My attention was therefore drawn to English authorities to some of which I must refer although I must bear in mind that each case must depend on its particular facts. I will first refer to those on which particular reliance was placed by counsel. *Crane* v. *Director of Public Prosecutions*,[2] and *R.* v. *Dennis & Parker*,[3] were cited for the proposition that separate indictments against two defendants cannot be tried at the same time even with the consent of the parties. However, the latest exposition of the law with regard to joinder of offenders or of offences is amply discussed by Sachs J. in *R.* v. *Assim*.[4] In that case the appellant Assim was convicted on one ground of maliciously wounding one Wilkinson. He had been indicted with one Cemal, who was convicted on a separate count of assaulting one Longton, thereby occasioning actual bodily harm. The appellant's ground of appeal was:—

"That the court had no power in law to try two defendants containing only two counts, one being against the appellant alone for maliciously wounding Wilkinson, and the second count being against his co-defendant alone for assaulting Longton".

That case is, to my mind, on all fours with our present case where two separate persons were charged and tried together in respect of two different offences. In delivering the judgment of the full court of five judges Sachs J. stated that questions of joinder of offenders or of offences are always in the discretion of the court unless restrained by statute and that joinder of counts being a matter of practice, any departure from the relevant rules would only amount to an irregularity unless the matter has occasioned a failure of justice. Moreover, the learned judge held that the court is not generally disposed to quash the conviction on account of such irregularities unless objection is taken before plea at the trial, although there can be no hard and fast rule on the point. I would like to cite certain passage in that case which I think are distinctly germane to our present appeal. At pages 63 and 64 he said:—

"The present case is thus indeed one which inevitably falls within the four corners of any rule of practice, however narrowly it might be formulated, permitting the joinder of several offences. Whilst, however, it is of course not practicable for this court, after hearing submissions many of which were directed in the main to facts under consideration in this particular case, to lay down exhaustive rules dealing specifically with every type of case, yet equally it is desirable to come to some general conclusions as to what would nowadays be in general an appropriate rule of practice on the basis that none of the rules of 1915 deal with the joinder of offenders.

As a general rule it is, of course, no more proper to have tried by the same jury several offenders on charges of committing individual offences that have nothing to do with each other than it is to try before the same jury offences committed by the same person that have nothing to do with each other. Where, however, the matters which constitute the individual offences of the several offenders are upon the available evidence so related, whether in time or by other factors, that the interests of justice are best served by their being tried together, then they can properly be the subject of counts in one indictment and can, subject always to the discretion of the court, be tried together. Such a rule, of course, includes cases where there is evidence that several offenders acted in concert but is not limited to such cases".

Therefore, if we have to resort to the practice enforced in England, it would appear that the joint trial in the present case was not a nullity. In any event, it is undesirable to follow the English practice as there are provisions in our Criminal Procedure Code enabling the court in its discretion to try at the same trial two persons separately charged in respect of separate offences committed in the same transaction. For that is what this case represents. (See section 170 of the Criminal Procedure Code). So long as the discretion was exercised judicially and not capriciously the court is not generally disposed to quash a conviction unless there has been a miscarriage of justice. Counsel attempted to play on the words Arrest Cases Nos. A1 of 1965 and A2 of 1965, thus indicating that they are really two distinct cases and since they have been absorbed in Arrest Case No. A4 of 1966 they amount to a consolidation of two cases for which the law does not provide and accordingly the joint trial was a nullity. I do not think there is much force in that argument. As I have indicated, this is not a case of consolidation of cases but of two separate persons being charged and tried in respect of two separate offences committed in the same transaction. Counsel conceded that no objection was taken at the

commencement of the hearing that his client would be prejudiced thereby. Although in the last analysis the question was one for the discretion of the learned president, whose decision could only be reversed if it was done capriciously, all the elements were present in the case which would justify the exercise of discretion in favour of a joint trial.

Strictly speaking, "indictment" is unknown in our law of procedure and practice. As was said in *Sardara & Ors.* v. *R.*,[5] after noting the principles enunciated in *Crane* and *Dennis*,

> "In my view, the argument based on the analogy of English law cannot hold good in India. It is always dangerous to decide cases arising under an Indian statute by analogy of cases arising under English common law with its archaic technical rules of procedure. Drawing up of an indictment is procedure peculiar to English law and there is no parallel for it in the Indian procedure or practice".

In my view, the same can be said of this country.

The second ground of appeal is issue estoppel. It is submitted that Raja Shamsusah, a convicted accomplice, was called by the prosecution to allege that he was innocent in contradistinction to his conviction. He was therefore estopped from giving evidence on the facts on which his conviction was based. It was said that the whole of the evidence which he gave in his defence at the first hearing was re-adumbrated in his examination-in-chief, in cross-examination, and in re-examination at the second hearing. The validity of this ground now calls for consideration. The passage of Lord MacDermott in *Sambasivam* v. *Public Prosecutor* [6] was strongly relied by counsel in support of the above proposition. It is therefore necessary to examine the facts of that case and the principle underlying it, no doubt based in the light of the existing facts, and then to consider the facts within the context of counsel's submission. In *Sambasivam's* case the appellant, an Indian Tamil, was travelling on foot in the company of two Chinese. They met a party of three Malays. A fight ensued between the two groups in the course of which one of the Chinese was killed. The Malays alleged that they had been fired at by the Chinese and that the appellant had with him a revolver which he had held out and pointed at one of them. The appellant was charged with two offences, firstly, carrying a firearm, and secondly, being in possession of ammunition. He was acquitted on the second charge and a new trial was ordered on the first charge. At the re-trial a statement, which purported to have been made by the appellant but which was retracted and which had not been put in evidence at the first trial, was relied on by the prosecution. In the statement the appellant admitted carrying a firearm and being in possession of ammunition. The Board had to consider the effect upon the alleged admission of the fact that the appellant had already been acquitted of being in possession of ammunition. At page 151 Lord MacDermott said:—

> "The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim *'Res judicata pro veritate accipitur'* is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any step to challenge it at the second trial".

In the opinion of the Board the application of this principle might well have been made a ground for excluding the statement in its entirety, for it could not have been severed satisfactorily. But no objection was taken to it at the trial and the Board was content to say that it should not have been left to the assessors without an intimation that the prosecution could not assert, or ask the court to accept, a substantial and important part of what it said. As this direction was not given, the Board set aside the conviction at the second trial.

Sambasivam's case was applied by the High Court of Australia in *Kemp* v. *The King.*[7] In that case the accused who was charged with indecent assault on three counts was acquitted on the first and second counts and was convicted on the third. The conviction was set aside on appeal and a new trial ordered. Upon that trial, in proof of similar acts by the accused, evidence was submitted of the occasions in respect of which he had been acquitted. The accused was convicted and he appealed. It was held that the evidence was not admissible and the conviction was quashed. Dixon C.J. in *Mraz* v. *The Queen (No. 2)*[8] treated *Sambasivam's* case as a principle of "estoppel by judgment in criminal proceedings". Again, in that case the accused was alleged to have caused the death of a woman in the course of committing rape which under the law of New South Wales constituted murder. He was originally indicted for murder but was convicted of manslaughter. The conviction was set aside. He was subsequently indicted for rape in respect of the same set of facts. The High Court held that the verdict of not guilty of murder involved as a matter of law a finding that the accused did not commit rape and therefore a plea of issue estoppel was accordingly made out at the subsequent hearing.

Sambisivam's case was also discussed in the House of Lords in *R.* v. *Connelly.*[9] However, the court was not prepared to apply the principle of issue estoppel to a case where the ultimate quashing of a murder conviction occurred in the special circumstances of that case. Be that as it may, it is significant to note how the House

of Lords analysed the principle of issue estoppel and the observations of their Lordships may throw some guiding light in the application of the principle to the present case. In *Connelly's* case there had been an office robbery during which an employee had been killed, and the appellant together with three others had been tried for murder. At this trial there had been two issues put to the jury, namely, an *alibi* and, in the alternative, absence of felonious intent. He was convicted but the court of criminal appeal directed an acquittal by reason of a misdirection by the trial judge upon the first of these issues. When he was subsequently tried for robbery a plea of *autrefois acquit* was rejected by direction and he was convicted. The House of Lords rejected the plea of *autrefois*. Lord Morris treated *Sambasivam's* case as an instance of the application of the principle of *res judicata* to the criminal law. At page 230 he said:—

"Although the principle of *res judicata* applies to criminal cases as to civil cases the conclusions in criminal cases tried upon indictment are expressed either by verdicts of guilty or not guilty. The result is that issues are not isolated and analysed as they are in a judgment which specifies findings and records reasons. In very many cases, therefore, it is not possible to know or to deduce whether a verdict involves a particular conclusion or determination. That is the position in the present case".

On issue estoppel Lord Hodson was of the view that "it is an aspect of the law which lies behind the application of the principle of *autrefois acquit*" (p. 244). He re-stated the principle as summarised by Dixon J. (as he then was) in *Wilkes'* case [10]:—

"There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of issue estoppel should not apply".

Lord Devlin preferred to treat *Sambasivam's* case as an extension of the principle of *autrefois* (p. 253). The learned Lord observed that actual determination of issues is what is required for issue estoppel and he said that there is no trace so far of its application to criminal matters. Lord Pearce seemed to treat *Sambasivam's* case as a principle of *res judicata*. On issue estoppel he had this to say:—

"The maxim *nemo debet bis vexari* underlies both pleas and is a strong element in both. Estoppel and consistency in the court underlie *autrefois acquit*, but they have no relation to *autrefois convict*. For in the latter case no estoppel or inconsistency would result from a second prosecution. Lord Blackburn in *Wemyss's* case (L.R. 10 Q.B. 378) based *autrefois convict* on the principle *transit in rem judicatam;* the offence has passed into a conviction and the offence has ceased to exist".

In the United States of America the plea of issue estoppel is also well established (see *Harris* v. *State of Georgia* [11]).

Sambasivam's case was first applied by the Supreme Court of India in *Pritam Singh* v. *State of Punjab* [12] and established beyond question in *Manipur Administration* v. *Thokchom Bira Singh.*[13] In the former case the appellant was acquitted of the offence of possession of a certain revolver which was in fact in issue which had to be established by the prosecution before he could be convicted. That fact was found against the prosecution and could not be proved in the subsequent proceedings between the Crown and him under a charge of murder. The evidence against him in the latter proceedings would have to be considered regardless of the evidence of discovery of the revolver from him. In the latter case Bira Singh and others were charged under sections 114, 149, etc. of the Indian Penal Code for gathering in a public place in defiance of an order promulgated under section 144 of the Indian Criminal Procedure Code on 25th April 1960 and for doing other unlawful acts. Previous to the institution of the above case the district magistrate had filed a complaint under section 188 of the Indian Penal Code against Bira Singh alone, alleging that he had on 25th April 1960 disobeyed the order promulgated under section 144 of the Criminal Procedure Code and had with other persons formed an unlawful assembly. He pleaded in his defence, in the complaint case, that he was not present at the scene of the occurrence and that he had been falsely implicated. The magistrate rejected his plea and accepted the prosecution case and convicted him of an offence under section 188 of the Indian Penal Code. On appeal he was acquitted on the ground that the prosecution had failed to prove that he was present at the scene of the occurrence. In his trial under sections 114, 149, etc. of the Indian Penal Code an objection was raised on his behalf that the trial was barred by section 403 of the Indian Criminal Procedure Code (which corresponds with section 302 of our Code) by reason of his acquittal under section 188 of the Indian Penal Code. The objection was rejected and he was convicted with the others. On appeal the conviction was set aside on the ground that the finding recorded by the appellate court in the case under section 188 of the Indian Penal Code that he was not present at the scene of occurrence on 25th April 1960 was final and binding on the prosecution and that no evidence could be led to establish a contrary state of affairs in the trial under sections 144, 149 of the Indian Penal Code. His acquittal was upheld by the Supreme Court.

Thus, the principle underlying issue estoppel is firmly rooted in this country, Australia, India, and the United States of America. In the United Kingdom, although its application is foreign to the criminal law no exception is taken to its soundness as a principle of law. It seems to me that these cases turned upon whether there had been a specific finding on an issue of fact — an

issue directly raised regarding an ingredient of the offence charged at the later trial when the accused was acquitted in the former proceeding. Simply stated, the principle of issue estoppel relates only to the admissibility of evidence which is designed to upset the finding of fact recorded by a competent court on a lawful charge after a lawful trial. It is not the same as *autrefois acquit;* nor does it prevent the subsequent trial of any offence. It only precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a competent court on a former occasion has made a specific finding in favour of the same prisoner.

It is now said by counsel that P.W.5 is estopped from denying the facts on which his conviction at the earlier trial was based and therefore he cannot be put in the witness box to establish a contrary state of affairs. As indicated earlier, it may now be convenient to examine the facts of the first and second hearings in the context of counsel's submission.

At the first hearing P.W.5 was co-accused who gave evidence in his defence denying the allegations made by the present appellant exculpating himself at his expense. His explanation was that the present appellant had informed him that the work had been completed by Hashim, another co-accused, and he signed the indent as he was told by his superior officer to do so. P.W.5 and the present appellant were convicted but the conviction against the appellant was set aside on appeal and a new trial ordered on the ground that there was no finding by the learned president that he knew or must have known that the work was never carried out. That issue was one of the ingredients to constitute the offence in the charge. Therefore that issue was never decided against the present appellant. Can that issue be raised again at the re-trial of the present appellant? I think so. P.W.5, an accomplice, was called. He admitted he was an abettor. In other words, when he signed the indent that the work was completed he knew it was false. P.W.5 did not retract what he had said at the earlier trial.

In the light of these facts it is abundantly clear that the issue estoppel enunciated in *Sambasivam's* case is not applicable in the present case. It does not apply to a re-trial of the same accused in respect of the same charge. It seems to me that *Sambasivam's* case does not decide such a far-reaching proposition as that contended by counsel and I think that in the present case it has been pushed too far. That principle will only apply against P.W.5 if he had subsequent to his conviction been charged with the offence of criminal conspiracy under section 120A of the Penal Code in which case he may rely on *autrefois convict* but definitely he could have pleaded issue estoppel that the issue that he knew or ought to have known that the work was never completed which is also an essential ingredient of the offence under section 120A of the Penal Code had been raised and decided against him.

The appellant also complained that the learned president had failed to consider the defence story adequately and drew inferences unfavourable to him and there are also other grounds raised which are inter-connected and over-lapping. I propose to consolidate them under one main head, namely, whether the conviction was against the weight of evidence. In the present case, like in any other summary trial, it is the duty of the trial court to review the totality of the evidence at the conclusion of the case and make a finding of its own whether the defence has raised a reasonable doubt as to the the truth of the prosecution case or as to the accused's guilt. The learned president in his judgment directed his mind to the appellate court's decision in *Hashim* v. *Public Prosecutor* [14] and reviewed the defence story and concluded:—

> "For these main reasons the court found that the defence had not raised a reasonable doubt as to the truth of the prosecution case or as to the guilt of the accused".

The words used by the learned president in giving his decision show, in my view, that he was following the principle laid down by Spenser-Wilkinson J. in *Mohamed Yatim's* case [15] and reiterated in *Mah Koh Cheong's* case.[16] The validity of those decisions is never in doubt and they have been consistently followed. I see no reason to think that in reaching his decision the learned president applied the wrong test and I certainly do not take the view that his judgment reveals any misapprehension of the effect of the evidence which was called before him. In my view, the evidence before the learned president was such as to enable him to say that the appellant had not raised a reasonable doubt as to his guilt or as to the truth of the prosecution case.

Lastly, it is submitted, though the proposition was not argued at length that the learned president in assessing the credibility of P.W.5 and the appellant had failed to take into consideration the previous good character of the appellant as opposed to that of the witness P.W.5. I find the proposition attractive but the facts do not justify such a proposition.

In cases of bribery, like all criminal cases, the golden rule is that the accused person cannot be convicted unless the court is satisfied beyond reasonable doubt that he is guilty. This rule admits of no qualification in relation to the character of the accused or of the witnesses. It cannot be argued that if the accused is of bad character, persons who show tendencies towards perjury and fabrication of evidence may be relied upon when giving evidence against him, though if the accused's character is exemplary their evidence would be regarded as worthless on

account of their inability to adhere to the truth. But where the accused person in a bribery case pleads and produces evidence of good character which the court regards as satisfactory, and if it appears to the court that a person possessing such a character would not be likely to act, in the circumstances proved to have existed at the time, in the manner alleged by the prosecution, such improbability must be taken into account in determining the question whether or not there is reasonable doubt as to the guilt of such accused person. This issue was raised and considered by Cornelius J. (as he then was) in *Emperor* v. *Khurshid Hussain.*[17] That was an appeal against the acquittal of the respondent by the sessions judge in an appeal by the respondent from his conviction by the magistrate under section 161 of the Indian Penal Code and a sentence of 6 months imprisonment. The respondent was a superintendent employed by the Lahore Corporation. The complainant was a fodder contractor and since April 1945 had been delivering supplies of fodder for cattle under the care of the respondent. In August and September 1945 the respondent on a number of occasions rejected the fodder on the alleged ground that it was not of the requisite quality. In October 1945 the respondent demanded that the contractor should pay him a sum of money by way of illegal gratification in order to ensure smooth working for the future. The contractor filed a complaint and later a trap was laid and as a result the respondent was caught. In his possession were recovered marked notes. The respondent's immediate explanation was that the money was received by him from the contractor in part payment of a loan. He adhered to his statement at the trial and attempted to support it by production of evidence.*

In the instant case there is no positive proof as to the excellence of the appellant's character. The appellant has neither pleaded nor produced evidence of his character beyond stating his educational background and administrative experience. To say that no complaints have been lodged against him is at best a negative averment.

Appeal dismissed.

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* It would appear from *Khrushid Hussain's* case that what the accused did was to produce evidence of his excellent character in contrast to that of the complainant. The learned judge after discussing the relevancy of the evidence of the character of the respondent said: "The learned sessions judge noted that there had been no previous complaint against the accused, and even the complainant had testified that this was the first time that a bribe had been demanded from him, but the fact that there is no complaint against a person is not equivalent to his having an excellent character, and on the other hand it is not impossible that he may have been caught in his first attempt at corruption". — *Ed.* M.L.J.

CHEN CHONG & ORS. v. PUBLIC PROSECUTOR

[A.Cr.J. (Raja Azlan Shah J.) May 3, 1967]

[K.L. — Criminal Appeal No. 34 of 1967]

Penal Code, ss. 34 & 392 — Robbery — Common intention — Pre-arranged plan — Plea of guilty.

Criminal Law and Procedure — Charge — Explanation of ingredients in — Criminal Procedure Code (Cap. 6), s. 173(b).

The four appellants had pleaded guilty of charges under the Penal Code, section 392 read with section 34, to wit, in furtherence of the common intention robbed one *CTK* of a lorry carrying 188 bags of tin ore valued at $52.000. Each of them was convicted and sentenced to 3 years imprisonment. On appeal against conviction and sentence.

Held: as their pleas were unequivocal pleas of guilty made in open court in respect of facts which constituted the offence, their appeals against conviction and sentence must be dismissed.

Per Curiam: "The provision of section 173(b) of the Criminal Procedure Code seem to establish the salutary rule that before a court records a plea of guilty in reply to the common form question asking the accused to plead, it is necessary for the court as a matter of discretion to consider whether it is safe to accept the plea. The court can do that, firstly, by considering each and every ingredient of the charge; secondly, by satisfying itself by questioning the accused whether he really understands the charge and intends to admit without qualification each and every ingredient that constitutes it; and finally that he clearly understands the nature and consequences of his plea. The court then records the facts as presented by the prosecuting officer to ascertain whether admission of the facts amounts to a plea of guilty in law. Detailed attention to the facts to be recorded must obviously depend on the nature of the charge and the seriousness of the case. If the facts establish the offence charged, the accused is asked whether he admits such facts. If he does admit, then the court records the plea and proceeds to consider the question of sentence. Once the accused is sentenced then the plea ranks as a conviction. The plea must be an unequivocal plea of guilty. It is important that there should be no ambiguity in the plea. If there are elements in the case which indicate that the accused is really trying to plead not guilty or, as Lord Goddard put it, 'Guilty, but . . .', then the court has no discretion but to record a plea of Not Guilty."

Cases referred to:—

(1) *Koh Mui Keow* v. *R.* [1952] M.L.J. 214.

(2) *Low Hiong Boon* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 135.

(3) *Ahmad bin Haji Tahir & Ors.* Penang — Criminal Revision No. 11 of 1958 (unreported).

(4) *R.* v. *Cole* (1965), 49 Cr. App. R. 199; [1965] 2 Q.B. 388; [1965] 2 All E.R. 29.

(5) *R.* v. *Durham Quarter Sessions, ex. p. Virgo,* [1952] 1 All E.R. 466, 469.

CRIMINAL APPEAL.

S. P. Seenivasagam (*Miss Devi* with him) for the appellants.

Che Thairah binte Suleiman (Deputy Public Prosecutor) for the respondent.

Raja Azlan Shah J.: The appellants who are in their late thirties were charged under section 392 of the Penal Code read with section